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Supreme Court, U.S.
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In The

Supreme Court of the United States

DENISE M. MARTINEZ,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California,

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was charged in a sworn felony complaint filed by the San Diego County District Attorney in September, 1991. An arrest warrant issued in January, 1992. Petitioner was not arrested on the warrant and brought before the court until November, 1995. Her motion to dismiss for violation of her Sixth Amendment speedy trial right was denied and that ruling was affirmed by the California Supreme Court which found that a felony complaint was not a "formal charge" which triggered the protections of the Speedy Trial Clause because "it is not a document upon which a defendant may be subjected to trial." This petition thus raises the following questions:

1) Does the Sixth Amendment right to a speedy trial apply when the State publicly initiates a criminal prosecution against the defendant by filing a pleading (felony complaint) charging a public offense based upon probable cause, which document the State defines as an "accusatory pleading," although a probable cause hearing (preliminary examination) is a prerequisite to trial jurisdiction?

2) Does the Sixth Amendment right to a speedy trial apply when the State has publicly accused a defendant of a crime by filing a felony complaint and issuing an arrest warrant, based upon probable cause, which tolls any applicable statute of limitations?"

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In The

Supreme Court of the United States

DENISE M. MARTINEZ, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DENISE M. MARTINEZ respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The decision of the Supreme Court of the State of California, filed on April 6, 2000, (App., *infra,* 1a-25a, *infra,*) is reported at 22 Cal.4th 750, 94 Cal.Rptr.2d 381, 996 P.2d 32.

The decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One was filed on August 12, 1997 and modified on August 29, 1997. It was formerly reported at 57 Cal.App.4th 166. That decision is reproduced, as modified, in the Appendix, *infra,* at 27a-39a.

JURISDICTION

The judgment of the California Supreme Court was entered on April 6, 2000. A timely petition for rehearing was denied by the California Supreme Court on May 17, 2000. (App., *infra,* 26a.)

The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...."

The Fourteenth Amendment to the Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ..."

STATEMENT OF THE CASE

On September 6, 1991, petitioner was arrested for drunk driving. She was booked and then released without charges being filed. (App., *infra,* 3a.)

On September 16, 1991, the San Diego County District Attorney filed a felony complaint against Martinez charging her with the September 6 drunk driving. App., *infra.*, 40a-42a. A letter notifying her of the charges and of a September 30, 1991 arraignment date, App., *infra,* 43a, was mailed by the district attorney to an Imperial Beach, California, address used for a misdemeanor arrest warrant issued for her 13 months before.

Martinez did not appear at the scheduled arraignment. A warrant for her arrest was issued on January 16, 1992. The warrant listed Martinez's address as 7349 Eckstrom Avenue, San Diego, California. Apparently a check of additional computer data bases disclosed that Martinez was receiving welfare payments at 2602 Cowley Way, San Diego. App., *infra,* 29a.

On February 19, 1992, the San Diego County Marshal's office received information that Martinez was residing in West Palm Beach, Florida. It sent an abstract of the warrant to the West Palm Beach Police

Department and stated it believed she resided at 20071 Congress, Suite K-308, West Palm Beach, Florida. On April 23, 1992, the warrant was placed in the due diligence file of the San Diego County District Attorney's office.

On November 28, 1995, Martinez was arrested and arraigned the following day on the 1991 complaint. The matter proceeded to preliminary examination on December 12, 1995, where petitioner was held to answer.

On December 21, 1995, an information was filed against Martinez charging her with one count of driving under the influence (Cal. Veh. Code, § 23152, subd.(a)) for the September 6, 1991 incident and alleging that she had four prior DUI convictions within seven years prior to the instant offense, Cal. Veh. Code, § 23175, thereby elevating the offense from a misdemeanor to a felony. *Ibid.*

On January 26, 1996, petitioner filed a motion to dismiss the charges against her on the grounds that her state and federal constitutional rights to a speedy trial had been violated. The motion was scheduled to be heard on February 16, 1996. The prosecutor opposed the motion, contending that the motion should be heard after trial and, in any event, that petitioner could not show she suffered any actual prejudice as a result of the delay. At the scheduled February 16, 1996 hearing on the motion to dismiss, the court denied the motion without prejudice to its renewal at trial.

On February 27, 1996, the trial began. Defendant renewed the motion to dismiss at trial, and the trial court deferred ruling pending litigation of the issue of guilt or innocence of the DUI charge. The prior conviction allegations were bifurcated, and defendant waived jury trial as to those allegations. The DUI charge was tried to a jury, which found defendant guilty of that charge on February 29, 1996.

After receiving the verdict and discharging the jury, the trial court conducted a hearing on defendant's motion to dismiss for denial of a speedy trial. At this hearing, the parties presented evidence on the issues of justification for the delay and prejudice resulting from the delay. Testifying in her own behalf, defendant denied any memory of the September 1991 DUI arrest or of what she had done on that day. She said she had never lived on Elder Avenue in Imperial Beach, where the arraignment notice was sent, and had never told anyone that she lived there.

Regarding defendant's speedy trial right under the federal Constitution, the trial court, considering itself bound by "California case law," concluded that the right did not attach upon the filing of the felony complaint in September 1991, or upon the issuance of the arrest warrant in January 1992, but only upon the filing of the information in December 1995. Because there was no lengthy delay of trial after the filing of the information, the trial court concluded that defendant had not been denied her speedy trial right under the federal Constitution.

Defendant then admitted the prior DUI convictions alleged in the information. The court suspended imposition of sentence and placed defendant on formal probation for five years on conditions including 180 days in county jail.

On defendant's appeal from the judgment, see Cal. Pen. Code, § 1237 [order granting probation deemed a final judgment for purposes of appeal], the Court of Appeal of the State of California, Fourth Appellate District, Division One, affirmed on August 12, 1997. As to the applicability of the Sixth Amendment speedy trial right to this case, the Court of Appeal, feeling bound by California Supreme Court interpretation of the right, found it did not apply in this case "[b]ecause she focuses on the four-year delay before an information was filed against her, Martinez's

right to a speedy trial under the United States Constitution is not involved here."

Petitioner sought and obtained review by the California Supreme Court. On April 6, 2000, the California Supreme Court filed its opinion holding that petitioner was not an "accused" within the meaning of the Sixth Amendment between the filing of the felony complaint on September 16, 1991 and her arrest and restraint as a result of the arrest warrant on November 28, 1995. The primary basis of the California Supreme Court's holding that defendant was not an accused within the meaning of the Sixth Amendment was its conclusion that "[a]lthough at first glance a felony complaint may appear to be a "formal charge," it is not a document upon which a defendant may be subjected to trial." *People* v. *Martinez, supra,* 22 Cal.4th, 750, 763; App., *infra,* 14a.

Petitioner filed a timely petition for rehearing in the California Supreme Court which was denied on May 17, 2000. App., *infra,* 26a.

WHY THE WRIT SHOULD BE GRANTED

I
The Magnitude of the Issue

This case presents an issue of interpretation of the Sixth Amendment's Speedy Trial Clause which impacts 99 percent of the over 100,000 felonies prosecuted per year in the most populous State of the Union.

Since 1977, the California Supreme Court has interpreted this Court's decision in *United States* v. *Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), to exclude from the Speedy Trial Clause's definition of an "accused," persons against whom a sworn felony complaint has been filed in a California state court. In this case, the California Supreme Court specifically reconsidered and reaffirmed its interpretation of the Sixth Amendment Speedy Trial Clause and the *Marion* decision and held that the filing of a felony complaint, even when coupled with the issuance of an arrest warrant and the tolling of the statute of limitations, does not render the named defendant an "accused" within the meaning of the Sixth Amendment. Petitioner contends that this interpretation is erroneous and ignores the plain language of the Speedy Trial Clause and the holdings of this Court.

Resolution of the issues presented is especially important by virtue of the sheer number of citizens directly effected by the California Supreme Court's decision. California is the most populous State of the Union, exceeding the population of the next most populous State, Texas, by over fifty percent.[1] California

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[1] U.S. Census Bureau population estimates for July1, 1999, were approximately 33 million for California and 20 million for Texas. Accessed on August 7, 2000 from Internet site http://

prosecutes more felonies per year than all criminal cases, felonies and misdemeanors, prosecuted in all federal court.[2]

In addition to the direct effect upon persons accused of felonies in California, the decision of the California Supreme Court is likely to be relied upon by the courts of other jurisdictions to deprive accused persons in those jurisdictions of the protections of the Speedy Trial Clause.

Because of the far reaching effect of this ruling which deprives vast numbers of accused persons of the protection of a fundamental constitutional right, resolution by this Court is appropriate.

II
The Filing of a Felony Complaint Renders The Named Defendant an "Accused" Within The Meaning of The Sixth Amendment

The State of California provides for two alternative methods of prosecuting a felony. (Cal. Const., art. I, § 14; see also Cal. Pen. Code, §§ 682, 737, 949.) The first method is to obtain an indictment from a grand jury. California prosecutors proceed by indictment in less than one percent of all felony prosecutions. See footnote 2. The second, and nearly universally used, method is for the district attorney to file a "felony complaint" upon which a preliminary

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www.census.gov/population/estimates/state/st-99-1.txt

[2] The California Attorney General reports 114,775 *felonies* filed in superior court in 1997, the most recent year for which statistics are available. Only 691 were prosecuted by indictment. http://caag.state.ca.us/cjsc/prof98/tabs/985906.pdf. The United States Department of Justice, Bureau of Justice Statistics reports 69,351 *criminal* charges filed in U.S. District Courts for the same year. http://www.ojp.usdoj.gov/bjs/abstract/cfjs97.htm. Both Internet sites accessed on August 7, 2000.

examination is held. If the magistrate[3] presiding over the preliminary examination finds probable cause to believe a crime has been committed and the defendant is guilty, the magistrate makes an order holding the defendant to answer for trial. Upon the issuance of the magistrate's "hold to answer" order, the district attorney may file an information within 15 days. Cal. Pen. Code, § 1382, subd. (a)(1). The information, like an indictment, vests trial jurisdiction in the superior court.[4]

The California Supreme Court held in this case that the Sixth Amendment speedy trial guarantee does not protect a defendant in a California state felony prosecution until either the defendant's actual restraint on charges or the filing of an indictment or an information. The California Supreme Court specifically held that the filing of a felony complaint, even when coupled with the issuance of an arrest warrant, which tolls the applicable statute of limitations, does not trigger the Sixth Amendment's protection. (App. A-15-17.)

Petitioner contends generally that the timing of the attachment of the Sixth Amendment's guarantee of a speedy trial depends upon whether the defendant has

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[3] All "magistrates" in California are judges and vice versa. Magistrates are the judges of the Supreme Court, the courts of appeal, the superior courts, and the municipal courts. Cal. Penal Code, § 808. Magistrates conducting preliminary examinations are almost invariably superior court judges. See footnote 4.

[4] All California counties eligible to unify their superior and municipal courts without preclearnace from the U.S. Department of Justice under the Voting Rights Act of 1965 have done so. The two remaining counties have filed for preclearance authorization. The superior court is now the court of general trial jurisdiction for all matters in 56 of the 58 counties in California. Cal. Const., art. VI, § 23; see Judicial Council of California News Release No. 33, June 28, 2000. App., *infra*, 52a-53a.)

become an "accused" not upon either the title of the charging document or the acquisition of jurisdiction by the trial court. She further contends specifically that the filing of a California felony complaint, a sworn accusatory pleading executed by the public prosecutor asserting probable cause and publicly filed in a court of record, renders the named defendant an "accused" for Sixth Amendment purposes.

A

The speedy trial guarantee is a fundamental right which is binding on the states through the Fourteenth Amendment. *Klopfer* v. *North Carolina* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

> "The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ....' On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time." *United States* v. *Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Marion was the first case to consider the question of when the speedy trial right attaches. The *Marion* defendants were indicted in 1970 for fraudulent business practices alleged to have occurred between 1963 and early 1967. Prior to the indictment no official accusation of any kind had been filed although the defendants' alleged fraudulent activities were known to

the authorities at least by 1967. The defendants claimed that "their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment". *Id.*, at p. 313. The Court, held "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the appellees were indicted on April 21, 1970." *Ibid.*

Marion thus distinguished what is now recognized as the difference between pre-accusation delay, which is a due process concern, and post-accusation delay, which is a Sixth Amendment speedy trial concern. *Id.*, at p.324; *U.S.* v. *Lovasco*, 431 U.S. 783, 788, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977).

In making that distinction, the Court used a broad array of terms to describe the point at which the speedy trial right attaches. For example, the following terms are all used interchangeably in that regard by the *Marion* court: "after a person has been accused of a crime," *Marion, supra,* 404 U.S. at p. 317; "after charge or indictment," *Id.*, at p. 318; "when a citizen is charged or accused," *Ibid.*; "some charge," *Id.*, at p. 319; "public accusation," *Id.*, at p. 320; "indictment, information, or other formal charge," *Id.*, at p. 321; "the subject of public accusations," *Ibid.*; "arrest or charge" *Id.*, at p. 322. Nothing in the *Marion* decision limited the attachment of the speedy trial right to either a particular kind of pleading or to the acquisition of trial court jurisdiction. Although the *Marion* court specifically referred to the filing of an "indictment or information," it is submitted that those references were merely the result of the fact that *Marion* concerned a federal prosecution where those are the only pleadings available to the Government.

Prior to *Marion*, California Supreme Court

precedent held that the filing of a felony complaint triggered the Sixth Amendment speedy trial protection. *People* v. *Jones*, 3 Cal.3d 734, 91 Cal.Rptr. 578, 478 P.2d 10 (1970); *People* v. *Aguirre* 181 Cal.App.2d 577, 580, 5 Cal.Rptr. 477 (1960); *People* v. *Jordan*, 45 Cal.2d 697, 708, 290 P.2d 484 (1955). Unfortunately, since *Marion* California courts have talismanically applied the terminology used in the summary description of the *Marion* holding, "formal indictment or information," *Id.*, at p. 320; see *People* v. *Hannon*, 19 Cal.3d 588, 605-606, 138 Cal. Rptr. 885, 564 P.2d 1203 (1977), as the prerequisite to Sixth Amendment protection in felony prosecutions. Although the California Supreme Court's decision in this case gives the appearance of retreating slightly from its previous approach, it has merely shifted it focus from the terms "indictment" and "information" to the preceding word, "formal" to reach the conclusion it is a "formal charge", i.e. "a document upon which a defendant may be subjected to trial" which is the real talisman of Sixth Amendment protection. *People* v. *Martinez*, *supra*, 22 Cal.4th at p. 763; App-14. This conclusion finds no support in either the text of the Sixth Amendment or a considered reading of this Courts decisions construing it.

It is neither the label of the accusation nor the attainment of unconditional trial court jurisdiction which marks the point at which one becomes an "accused" and therefore protected by the Speedy Trial clause. The filing of a California felony complaint signals the end of the investigative stage of a criminal case and marks the beginning of a prosecution. It is a public announcement that the Government asserts probable cause to believe the named defendant is guilty of a felony offense and has decided to prosecute that person. It publicly accuses the named defendant of a felony and, therefore, renders the named defendant an "accused." Once the defendant is "accused" in the course of a criminal prosecution, the Sixth

Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" is activated.

A California felony complaint is a written pleading, made and subscribed under oath, and filed in a court of record. Cal. Pen. Code, § 959; Cal. Const., art. VI, § 1.

A person against whom a California district attorney has filed a verified felony complaint is unquestionably publicly charged with and accused of a crime. Upon the filing of a felony complaint, the magistrate must issue a warrant for the defendant's arrest which sets the amount of bail and commands the arrest of the defendant. (Pen. Code, §§ 813, 814, 815a.) The rules governing the forms of pleading in criminal actions are the same for complaints, indictments and informations. (*Id.*, §948 *et seq.*) A defendant charged under a complaint may plead guilty to any felony charged in the complaint the same as if the offenses were charged in an indictment or information, *Id.*, § 859a, and such complaints "shall be construed and shall have the substantially the same effect as provided . . . for indictments and informations." *Id.*, § 806.

The Speedy Trial Clause protects those whom the Government has "accused." No pleading, formal or otherwise, is necessary to invoke its protections. In *Dillingham* v. *United States* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), the Court found that the Speedy Trial Clause applied to one who had been arrested and released on bail without any court filing at all. This holding is because "the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him." *Id.*, at p. 65. It is incongruous to label one who has been arrested and released on bail without the initiation of court proceedings an "accused" but to hold that one

against whom court proceedings have been initiated is not an "accused," yet that is the result of the California Supreme Court's holding in this case.

III
State Action Which Tolls the Applicable Statute of Limitations Commences Speedy Trial Protection

In addition to her claim that the filing of a felony complaint renders one an "accused" for Sixth Amendment speedy trial purposes, petitioner asserts that state action which tolls the applicable statute of limitations, in this case the filing of the felony complaint coupled with the automatic issuance of an arrest warrant, further compels the conclusion that the protection of the Sixth Amendment Speedy Trial Clause has attached.

This Court has often noted the interrelation between the constitutional speedy trial protection and statutes of limitation. In *United States* v. *Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966) the Court noted that the indictments "were brought well within the applicable statute of limitations, which is usually considered the primary guarantee against bringing overly stale criminal charges." *Id.*, at p. 122; *Dickey* v. *Florida* 398 U.S. 30, 47, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) In *United States* v. *Marion*, *supra*, 404 U.S. 307, the Court stated: "There is . . . no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function." *Id.*, at p. 323. This view was reiterated in *United States* v. *Lovasco* 431 U.S. 783, 788-789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977) and recognized in *United States* v. *MacDonald* 456 U.S. 1, 8, 102 S.Ct. 1497, 71 L.Ed.2d

696, 704 (1982). In *United States* v. *Gouveia* 467 U.S. 180, 192, (1984) the Court again noted that "applicable statutes of limitation protect against the prosecution's bringing stale criminal charges against any defendant."

It would be anomalous in light of the congruent objectives of the speedy trial guarantee and legislatively adopted statues of limitation if the State's initiation of a prosecution to the extent that the statute of limitations is tolled did not trigger the protections of the Sixth Amendment's speedy trial protection. The point at which the statute of limitations is satisfied and the speedy trial protection begin are the same; commencement of a prosecution.

The conclusion is thus compelled that one becomes an accused within the meaning of the Sixth Amendment when the State commences a prosecution thereby satisfying the statute of limitations.[5] To hold otherwise would lead to an anomalous situation clearly not intended. If the government is allowed to file a document which satisfies the statute of limitations, but which does not invoke the protection of the speedy trial right, then an unlimited period of delay could follow the filing of such a document during which the defendant would be protected by neither the Sixth Amendment or the statute of limitations. The decisions of this Court construing the speedy trial right have always proceeded under the assumption that one of those two protections would always apply. Accordingly, in order to provide the speedy trial protection, the document which satisfies the statute of limitations must be found to render the named defendant an "accused" within the meaning of the Sixth Amendment Speedy Trial Clause.

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[5] This would be true even for offenses which have no statute of limitations such as murder or kidnaping since the real issue is whether a prosecution has commenced and the defendant is an "accused" within the meaning of the Sixth Amendment.

CONCLUSION

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." *Dickey* v. *Florida*, *supra*, 398 U.S. at pp. 37-38, 90 S.Ct. at pp. 1568-1569, 26 L.Ed.2d 26 (1970), fns. omitted.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.
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APPENDIX

[22 Cal.4th 750]

Filed 4/6/00

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DENISE M. MARTINEZ, Defendant and Appellant.	) SO46558)) Ct.App. 4/1) D025750)) San Diego County) Super. Ct.) No. 108866

OPINION

[22 Cal.4th 754]

KENNARD, J.,— The state and federal Constitutions both guarantee criminal defendants the right to a speedy trial (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1), and both guarantees operate in state criminal prosecutions (see *Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223 [87 S.Ct. 988, 993-994, 18 L.Ed.2d 1] [holding that the 6th Amend.'s speedy trial guarantee applies to state criminal prosecutions]), but there are two important differences in the operation of the state and federal constitutional rights as construed by our courts.

The first difference concerns the point at which the speedy trial right attaches. Under the *state* Constitution, the filing of a felony complaint is sufficient to trigger the protection of the speedy trial right. *(People v. Hill* (1984) 37 Cal.3d 491, 497, fn. 3 [209 Cal.Rptr.

323, 691 P.2d 989]; *People v. Hannon* (1977) 19 Cal.3d 588, 607-608 [138 Cal.Rptr. 885, 564 P.2d 1203] (Hannon).) Under the *federal* Constitution, however, the filing of a

[22 Cal.4th 755]

felony complaint is by itself insufficient to trigger speedy trial protection. (*Hannon, supra*, at pp. 605-606.) The United States Supreme Court has defined the point at which the federal speedy trial right begins to operate: "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." (*United States v. Marion* (1971) 404 U.S. 307, 320 [92 S.Ct. 455, 463, 30 L.Ed.2d 468].)

The second difference is in the showing that a defendant must make to obtain a dismissal for violation of the speedy trial right. For the federal Constitution's speedy trial right, the United States Supreme Court has articulated a balancing test that requires consideration of the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defense caused by the delay. (*Barker v. Wingo* (1972) 407 U.S. 514, 530 [92 S.Ct. 2182, 2191-2192, 33 L.Ed.2d 101].) Because delay that is "uncommonly long" triggers a presumption of prejudice (*Doggett v. United States* (1992) 505 U.S. 647, 651-652, 656-657 [112 S.Ct. 2686, 2690-2691, 2693-2694, 120 L.Ed.2d 520]), a defendant can establish a speedy trial claim under the Sixth Amendment without making an affirmative demonstration that the government's want of diligence prejudiced the defendant's ability to defend against the charge. (*Moore v. Arizona* (1973) 414 U.S. 25, 26 [94 S.Ct. 188, 189-190, 38 L.Ed.2d 183].) Under the state Constitution's speedy trial right, however, no presumption of prejudice arises from delay after the filing of a complaint and before arrest or formal accusation by indictment or information (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504, fn. 8 [149

Cal.Rptr. 597, 585 P.2d 219]); rather, in this situation a defendant seeking dismissal must affirmatively demonstrate prejudice (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 249 [219 Cal.Rptr. 420, 707 P.2d 793]).

Arguing against continued recognition of these differences between the state and federal speedy trial guarantees, defendant here urges us to bring the parallel constitutional speedy trial guarantees into more perfect alignment. Regarding attachment of the speedy trial right, she would have us accomplish this by holding that the federal right, like the state right, attaches upon the filing of a felony complaint, or at least upon the filing of a felony complaint and the issuance of an arrest warrant. Regarding the showing required to demonstrate a speedy trial violation, she asks us to adopt for our state Constitution the federal rule that a lengthy delay in prosecution raises a presumption of prejudice.

We reject both of these proposals, perceiving no persuasive reason to abolish the distinctions between the state and federal Constitutions' speedy

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trial rights as recognized by past decisions. We conclude, accordingly, that in a California prosecution the filing of a felony complaint, either with or without the issuance of an arrest warrant, is insufficient to engage the federal Constitution's speedy trial protection, and we conclude also that, absent violation of a statutory speedy trial provision, a showing of specific prejudice is required to establish a violation of our state Constitution's speedy trial right.

Defendant raises an additional issue: To determine whether violation of our state Constitution's speedy trial right has occurred, in the absence of a statutory speedy trial violation, may a trial court defer ruling on a motion to dismiss until after the evidence at trial has revealed the extent of the prejudice that the defense has suffered? We conclude that a trial court

may do so.

I

On September 6, 1991, a police officer arrested defendant Denise M. Martinez in San Diego for driving under the influence (DUI) (Veh. Code, § 23152, subd. (a)). She gave the arresting officer an address on Eckstrom Avenue in San Diego.

On September 16, 1991, the San Diego District Attorney filed a felony complaint charging defendant with DUI and alleging four prior DUI convictions (see Veh. Code, former § 23175, added by Stats. 1983, ch. 637, § 3, p. 2546, repealed by Stats. 1998, ch. 118, § 41; see now Veh. Code, §§ 23550-23552, added by Stats. 1998, ch. 118, § 84). An arraignment notice was sent to defendant at an address on Elder Avenue in Imperial Beach. Defendant did not appear for her arraignment on September 30, 1991, and on January 13, 1992, a magistrate issued a warrant for her arrest.

On November 28, 1995, three years and 10 months after the warrant was issued, defendant was arrested in San Diego on another alcohol-related charge, and the outstanding warrant was discovered. On December 12, 1995, a magistrate held a preliminary hearing on the September 1991 complaint, and defendant was held to answer.

On December 21, 1995, the San Diego District Attorney filed an information in superior court charging defendant with the September 1991 DUI and alleging the prior DUI convictions. Defendant moved to dismiss the charge for denial of her state and federal constitutional rights to a speedy trial. She argued that her federal constitutional speedy trial right attached upon the filing of the felony complaint, or upon the filing of the felony complaint and

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the issuance of the arrest warrant. Without addressing

the merits, the superior court denied the motion without prejudice to its renewal at trial.

Defendant renewed the motion to dismiss at trial, and the trial court deferred ruling pending litigation of the issue of guilt or innocence of the DUI charge. The prior conviction allegations were bifurcated, and defendant waived jury trial as to those allegations. The DUI charge was tried to a jury, which found defendant guilty of that charge.

After receiving the verdict and discharging the jury, the trial court conducted a hearing on defendant's motion to dismiss for denial of a speedy trial. At this hearing, the parties presented evidence on the issues of justification for the delay and prejudice resulting from the delay. Testifying in her own behalf, defendant denied any memory of the September 1991 DUI arrest or of what she had done on that day. She said she had never lived on Elder Avenue in Imperial Beach, where the arraignment notice was sent, and had never told anyone that she lived there.

Regarding defendant's speedy trial right under the federal Constitution, the trial court, considering itself bound by "California case law," concluded that the right did not attach upon the filing of the felony complaint in September 1991, or upon the issuance of the arrest warrant in January 1992, but only upon the filing of the information in December 1995. Because there was no lengthy delay of trial after the filing of the information, the trial court concluded that defendant had not been denied her speedy trial right under the federal Constitution. Regarding defendant's speedy trial right under the state Constitution, which attached upon the filing of the felony complaint, the trial court concluded that defendant had failed to carry her burden of demonstrating that the four-year delay in bringing her to trial had prejudiced her ability to defend against the charge. Accordingly, the court denied the motion to dismiss.

Defendant then admitted the prior DUI convictions alleged in the information. The court suspended imposition of sentence and placed defendant on formal probation for five years on conditions including 180 days in county jail.

On defendant's appeal from the judgment (see Pen. Code, § 1237 [order granting probation deemed a final judgment for purposes of appeal]), the Court of Appeal affirmed. It concluded that the trial court was not required to hear the motion to dismiss before trial, and that defendant had not demonstrated a violation of her constitutional right to speedy trial. Regarding actual prejudice, the Court of Appeal stated: "[Defendant] did not meet

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her burden of showing that she suffered actual prejudice from the prosecutorial delay. She merely speculates that the testimony of the two unavailable prosecution witnesses would have aided her defense. Accordingly, substantial evidence supports the trial court's finding that [defendant] suffered no actual prejudice from the delay, and the court did not err by denying her motion to dismiss."

II

In California, the state may prosecute a felony "either by indictment or, after examination and commitment by a magistrate, by information." (Cal. Const., art. I, § 14; see also Pen. Code, §§ 682, 737, 949.)

An indictment is "an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." (Pen. Code, § 889.) "The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury." (*Id.*, § 939.8; see *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1029 [13

Cal.Rptr.2d 551, 839 P.2d 1059] [construing this provision as requiring only a finding of probable cause].) An indictment charging a felony is filed in the superior court. (Pen. Code, § 949.)

An information is an accusatory pleading charging a felony, subscribed by the district attorney, and filed in the superior court. (Pen. Code, §§ 691, subd. (c), 739, 949.) Before the prosecution may file an information in superior court charging a felony, "there must be a preliminary examination of the case against the defendant and an order holding him to answer ...." (*Id.*, § 738.) A felony complaint is a written accusatory pleading subscribed under oath and filed with a magistrate. (*Id.*, §§ 691, subd. (c), 806.) A magistrate is "an officer having power to issue a warrant for the arrest of a person charged with a public offense." (*Id.*, § 807; see also *id.*, § 808 [providing that judges of the superior and municipal courts are magistrates, as are justices of the Supreme Court and the Courts of Appeal].) The preliminary examination is a public hearing conducted before a magistrate at which the prosecution and the defendant may present evidence. (*Id.*, §§ 865, 866, 868.) After the preliminary examination, the magistrate will order the defendant "held to answer" on the charge or charges stated in the complaint if "it appears from the examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty . . . ." (*Id.*, § 872, subd. (a).)

III

The leading case on the commencement of speedy trial protection under the federal Constitution's Sixth Amendment is *United States* v. *Marion*,

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supra, 404 U.S. 307 (*Marion*). There, a federal grand jury in April 1970 had indicted two defendants for various crimes allegedly committed between March 1965 and February 1967 as part of a fraudulent business scheme.

The defendants moved to dismiss the indictment, claiming a violation of their Sixth Amendment right to a speedy trial based on preindictment delay. The federal district court granted the motion, and the United States appealed directly to the Supreme Court, which reversed the judgment of dismissal. (404 U.S. at pp. 308-311 [92 S.Ct. at pp. 457-459].) The high court determined that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the [defendants] were indicted ...." (*Id.* at p. 313 [92 S.Ct. at p. 459].)

To reach this determination, the court looked first to the plain language of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...." (U.S. Const., 6th Amend.) The Supreme Court inferred from this language that "the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." (Marion, supra, 404 U.S. 307, 313 [92 S.Ct. 455, 459].)

The high court found "nothing in the circumstances surrounding the adoption of the Amendment indicating that it does not mean what it appears to say ...." (Marion, supra, 404 U.S. 307, 313-314 [92 S.Ct. 455, 469], fn. omitted.) The court added that the "framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay." (*Id.* at pp. 314-315 [92 S.Ct. at p. 460].) Likewise, no support for the defendants' proposed construction of the Sixth Amendment could be derived from the decisions of federal appellate courts, as no federal court had "reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved." (404 U.S. at p. 315 [92 S.Ct. at p. 460], fn.

omitted.)

The court considered also various state laws establishing speedy trial guarantees, and it found that most of these laws "are triggered only when a citizen is charged or accused." (Marion, supra, 404 U.S. 307, 318 [92 S.Ct. 455, 462], fn. omitted.) Although no federal statute had been enacted to enforce the Sixth Amendment speedy trial provision, rule 48(b) of the Federal Rules of Criminal Procedure (18 U.S.C.) then "authorize[d] dismissal of an indictment, information, or complaint '[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information

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against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial ....' The rule clearly is limited to post-arrest situations." (404 U.S. at p. 319 [92 S.Ct. at p. 463], italics added.)

Turning to the purposes of the Sixth Amendment speedy trial protection, the high court found that it was intended " 'to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.' " (Marion, supra, 404 U.S. 307, 320 [92 S.Ct. 455, 463].) The court then added:

"Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him

to public obloquy, and create anxiety in him, his family and his friends. . . . So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

"Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." (Marion, supra, 404 U.S. 307, 320-321 [92 S.Ct. 455, 463-464], fn. omitted.)

The court noted that there are "other mechanisms" to guard against possible or actual prejudice resulting from delay between crime and arrest or charge. (Marion, supra, 404 U.S. 307, 322 [92 S.Ct. 455, 464].) These "other mechanisms" include statutes of limitations and the Fifth Amendment's guarantee of due process. "There is ... no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function." (404 U.S. at p. 323 [92 S.Ct. at p. 465].) The due process clause of the Fifth Amendment may also apply when

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pretrial delay "caused substantial prejudice to [defendants'] rights to a fair trial...." (404 U.S. at p. 324 [92 S.Ct. at p. 465].)

Under the high court's decision in Marion, the Sixth Amendment speedy trial guarantee begins to operate either on the filing of an indictment, information, "or other formal charge," or when a suspect "has been arrested and held to answer." (Marion, supra,

404 U.S. 307, 321 [92 S.Ct. 455, 464].) Later decisions of the United States Supreme Court confirm that either event is sufficient. In *Doggett v. United States, supra,* 505 U.S. 647, the court held that the Sixth Amendment speedy trial protection attached when the defendant was indicted, even though he was not arrested and was apparently unaware of the indictment until more than eight years later. In *Dillingham v. United States* (1975) 423 U.S. 64 [96 S.Ct. 303, 46 L.Ed.2d 205], the court held that the Sixth Amendment speedy trial protection attached when the defendant was arrested and released on bond, even though he was not indicted until 22 months later. (See also *United States v. Palmer* (5th Cir. 1974) 502 F.2d 1233, 1234, revd. *sub nom. Dillingham v. United States, supra,* 423 U.S. 64 [providing additional factual details].)

Here, defendant does not contend that her Sixth Amendment speedy trial right attached upon her initial warrantless DUI arrest in September 1991, apparently because she was promptly released without bail and without any sort of probable cause determination by a magistrate. Rather, defendant contends that her Sixth Amendment right to speedy trial attached upon the filing of the felony complaint in September 1991 and the issuance of the arrest warrant in January 1992. She argues that the felony complaint was a "formal charge" and that the issuance of the arrest warrant, because it stopped the running of the statute of limitations, marked the commencement of the criminal prosecution. We are not persuaded.

As defendant acknowledges, this court has previously held that "the filing of a [felony] complaint is by itself insufficient to trigger the protection of the right to a speedy trial under the federal Constitution." (Hannon, supra, 19 Cal.3d 588, 605-606.) Defendant asks that we reconsider this decision.

In support of this request for reconsideration,

defendant argues first that in Hannon, supra, 19 Cal.3d 588, this court misinterpreted that part of the United States Supreme Court's decision in Marion, supra, 404 U.S. 307, stating that the Sixth Amendment's speedy trial protection engages either when the defendant is charged by "a formal indictment or information" or when the defendant is subjected to "the actual restraints imposed by arrest and holding to answer a criminal charge." (Marion, supra, at p. 320 [92 S.Ct. at p. 463].) In Hannon, this court focused in particular on the phrase

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"holding to answer a criminal charge." We reasoned: "It may well be that the Supreme Court's language simply reflects a dissimilarity in labels between our state's prosecutorial procedures and those in other jurisdictions. On the other hand, our perception is that the phrase 'holding to answer' is generally accepted to refer in a technical sense, as it does in California, to the decision of a magistrate to bind a defendant over for trial following a preliminary hearing. Thus we conclude that the Supreme Court intended by its use of the foregoing phrase to hold that the filing of a complaint is by itself insufficient to trigger the protection of the right to a speedy trial under the federal Constitution." (Hannon, supra, 19 Cal.3d 588, 605-606.)

Defendant submits that in Marion, supra, 404 U.S. 307, the United States Supreme Court did not use the term "holding to answer" to refer only to the decision of a magistrate after a preliminary hearing binding a defendant over for trial, but rather to any continuing restraint imposed upon an arrested defendant, such as incarceration or release subject to bail.

In light of later high court decisions, we agree with defendant that this court in Hannon, supra, 19 Cal.3d 588, construed too narrowly the phrase "holding to answer" in *Marion, supra*, 404 U.S. 307. In *Dillingham v. United States, supra*, 423 U.S. 64 (*Dillingham*), the court held that the federal Constitution's speedy trial

protection attached when the defendant was arrested and released on bond, even though he was not indicted until 22 months later. Nothing in the court's opinion in *Dillingham* suggests that a preliminary hearing was held before the defendant was released on bond. The court stated that "the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him." (Dillingham, supra, at p. 65 [96 S.Ct. at p. 303].) The court noted that " '[t]o legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime.' " (*Ibid.*, quoting Marion, supra, 404 U.S. 307, 320 [92 S.Ct. 455, 463].) Thus, insofar as a probable cause determination may be required for the federal Constitution's speedy trial right to attach upon arrest, it appears that a magistrate makes a sufficient probable cause determination when issuing an arrest warrant (see Pen. Code, §§ 813, 817), or when authorizing the continued detention of a defendant arrested without a warrant (see *County of Riverside v. McLaughlin* (1991) 500 U.S. 44 [111 S.Ct. 1661, 114 L.Ed.2d 49]), or when authorizing the defendant's release subject to bail. Stated another way, it appears that the right attaches upon arrest unless the defendant is released without restraint or charges are dismissed. (See *United States v. Loud Hawk* (1986) 474 U.S. 302, 311 [106 S.Ct. 648, 654, 88 L.Ed.2d 640] [6th Amend. speedy trial right did not apply "after respondents were freed without restraint"]; *United States v. MacDonald* (1982) 456 U.S. 1, 8 [102 S.Ct. 1497, 1502, 71 L.Ed.2d 696]

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["Once charges are dismissed, the speedy trial guarantee is no longer applicable"]; see also *U.S. v. Sorrentino* (2d Cir. 1995) 72 F.3d 294, 297; *U.S. v. Stierwalt* (8th Cir. 1994) 16 F.3d 282, 284; *United States v. Kidd* (9th Cir. 1984) 734 F.2d 409, 412; *State v. Harris* (1978) 37 Or.App. 431, 435-436 [587 P.2d 498, 501]; *State v. Austin* (R.I. 1994) 643 A.2d 798, 800, fn. 1; *State v. Boseck* (1986) 45 Wn.App. 62, 65-66 [723 P.2d 1182, 1184-1185]; 2 ABA Stds. for Crim. Justice (2d ed.

1980) com. to std. 12-2.2, p. 12.20 [proposing that a defendant is "held to answer" for speedy trial purposes when "brought before a judicial officer on some allegation of a crime or crimes (not necessarily a charge, as heretofore defined) upon which that judicial officer orders the defendant thereafter held in custody or released on bail or recognizance"].)

Although this court used flawed reasoning in *Hannon, supra*, 19 Cal.3d 588, it does not necessarily follow that we were wrong in concluding that the federal Constitution's speedy trial right does not attach upon the filing of a state felony complaint. Upon reexamination, we remain persuaded that a felony complaint is insufficient to trigger the Sixth Amendment speedy trial right. Although at first glance a felony complaint may appear to be a "formal charge," it is not a document upon which a defendant may be subjected to trial.

We noted this limitation of felony complaints in *Serna v. Superior Court, supra*, 40 Cal.3d 239, in which we held that the filing of a misdemeanor complaint does trigger the protection of the federal Constitution's speedy trial right. We explained: "A felony complaint, unlike a misdemeanor complaint, does not confer trial jurisdiction. It invokes only the authority of a magistrate, not that of a trial court. ([Pen. Code,] § 806.) ... The felony complaint functions to bring the defendant before a magistrate for an examination into whether probable cause exists to formally charge him with a felony. Only if probable cause exists may an information invoking the trial jurisdiction of the superior court be filed. In addition, the filing of a felony complaint, unlike indictment or accusation by information, does not threaten oppressive pretrial incarceration. The time constraints within which the preliminary hearing must be conducted or the complaint dismissed and the defendant released ([Pen. Code,] § 859b) ensure that the defendant is not subjected to extended anxiety or public opprobrium, and by giving the defendant immediate

notice of the charge and opportunity to defend avoid prejudice to the defense. This step, preliminary to formal accusation in the court with jurisdiction over the prosecution of the charge, does not implicate the Sixth Amendment right to speedy trial if our interpretation of Marion[, supra, 404 U.S. 307] is correct. The misdemeanor complaint, by contrast, is not a preliminary accusation. It is a formal charge, an accusatory pleading

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giving the court jurisdiction to proceed to trial." (*Serna v. Superior Court, supra*, 40 Cal.3d 239, 257, fn. omitted; see also *United States v. MacDonald, supra*, 456 U.S. 1, 10 [102 S.Ct. 1497, 1503] [finding speedy trial right did not attach because "there was no criminal prosecution pending on which [the defendant] could have been tried until the grand jury ... returned the indictment on which he was tried and convicted"].)

Thus, while we agree with defendant that the label of an accusatory pleading is not determinative, we conclude that a pleading does not constitute a "formal charge" for purposes of attaching the federal Constitution's speedy trial right unless the pleading is a formal accusation upon which a defendant may be brought to trial in the court with jurisdiction over prosecution of the offenses alleged. (See *Favors v. Eyman* (9th Cir. 1972) 466 F.2d 1325, 1327-1328; *Pharm v. Hatcher* (7th Cir. 1993) 984 F.2d 783, 785-786; *Steeley v. City of Gadsden* (Ala.Crim.App. 1988) 533 So.2d 671, 679; *State v. Mouser* (Alaska Ct.App. 1991) 806 P.2d 330, 339; *State v. Medina* (1997) 190 Ariz. 418, 420-421 [949 P.2d 507, 509-510]; *State v. Gee* (1984) 298 Md. 565, 573-574 [471 A.2d 712, 716]; *Dillard v. State* (Mo.Ct.App. 1996) 931 S.W.2d 157, 161-162.) In California state criminal prosecutions, a felony complaint is not such a pleading.

Defendant argues that even if, as we have here concluded, a felony complaint by itself is not sufficient

to bring into operation the Sixth Amendment's right to a speedy trial, the right attaches upon the issuance of an arrest warrant after the filing of a felony complaint, because this event terminates the protection afforded the defendant under the applicable statute of limitations. We disagree.

In 1977, when this court decided Hannon, supra, 19 Cal.3d 588, the statute of limitations for most felonies continued to run until the filing of an indictment or information or until the case was certified to the superior court on a plea of guilty or nolo contendere. (Pen. Code, former § 800; see Stats. 1975, ch. 1047, § 1, p. 2466.) Since 1981, however, the general felony statute of limitations may be satisfied also by the issuance of an arrest or bench warrant. (Pen. Code, § 804, subd. (d); see Uelmen, Making Sense out of the California Criminal Statute of Limitations (1983) 15 Pacific L.J. 35, 43-44.) Defendant argues, in essence, that because issuance of an arrest warrant terminates her protection under the statute of limitations, it must also begin her protection under the Sixth Amendment's speedy trial provision.

In Marion, the United States Supreme Court observed that criminal defendants are generally protected by the statute of limitations during the prearrest

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and preaccusation stages when the Sixth Amendment speedy trial guarantee has not yet engaged. (*Marion, supra*, 404 U.S. 307, 322-323 [92 S.Ct. 455, 464-465].) But the court also indicated that "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [defendants'] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." (*Id.* at p. 324 [92 S.Ct. at p. 465], fn. omitted.) Thus, due process guarantees span any gap between the end of protection under the statute

of limitations and the beginning of protection under the Sixth Amendment's right of speedy trial. Like other courts that have considered the issue (*Pharm v. Hatcher, supra*, 984 F.2d 783, 786, fn. 3; *State v. Crawford* (1987) 202 Conn. 443, 452, fn. 13 [521 A.2d 1034, 1039, 71 A.L.R.4th 543]; *State v. Utley* (Tenn. 1997) 956 S.W.2d 489, 493-494), we conclude that an event, such as issuance of an arrest warrant, may commence a criminal prosecution for purposes of the statute of limitations without engaging the protection of the Sixth Amendment's speedy trial clause.

Accordingly, we conclude that in this case defendant's speedy trial right under the federal Constitution's Sixth Amendment did not attach upon the filing of the felony complaint or the issuance of the arrest warrant, but only upon the filing of the information.

IV

Under our state Constitution, "[t]he defendant in a criminal cause has the right to a speedy public trial ...." (Cal. Const., art. I, § 15, cl. 1.) Although similar in wording and spirit to the federal Constitution's speedy trial guarantee, the state Constitution's guarantee has independent force and operates somewhat differently from the federal provision. (See *Hannon, supra*, 19 Cal.3d 588, 606.)

Under the federal Constitution, as we have seen, the speedy trial right does not attach upon the filing of a felony complaint, but only upon either arrest with continuing restraint or the filing of an indictment, an information, or a complaint charging a misdemeanor. Under the state Constitution, by contrast, the filing of a felony complaint is sufficient to trigger speedy trial protection. (*People v. Hill, supra*, 37 Cal.3d 491, 497, fn. 3; *Hannon, supra*, 19 Cal.3d 588, 607-608.)

Another difference is in the showing required to demonstrate a speedy trial violation. Under the *federal* Constitution, the defendant need not identify any specific prejudice from an unreasonable delay in bringing the

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defendant to trial after the speedy trial right has attached. *(Moore v. Arizona, supra,* 414 U.S. 25, 26 [94 S.Ct. 188, 189-190].) Instead, delay that is "uncommonly long" triggers a presumption of prejudice, with the presumption intensifying as the length of the delay increases. (*Doggett v. United States, supra,* 505 U.S. 647, 651-652, 656-657 [112 S.Ct. 2686, 2690-2691, 2693-2694].)

Under the *state* Constitution, by comparison, the showing that the defendant must make depends upon whether the allegedly unreasonable delay occurred before or after the defendant's statutory speedy trial rights attached. (4) The statutory speedy trial provisions, Penal Code sections 1381 to 1389.8, are "supplementary to and a construction of" the state constitutional speedy trial guarantee. (*People v. Godlewski* (1943) 22 Cal.2d 677, 682 [140 P.2d 381]; accord, *Barker v. Municipal Court* (1966) 64 Cal.2d 806, 811 [51 Cal.Rptr. 921, 415 P.2d 809]; *People v. Wilson* (1963) 60 Cal.2d 139, 145 [32 Cal.Rptr. 44, 383 P.2d 452].) Penal Code section 1382, subdivision (a), provides that a court "shall order the action to be dismissed" if an information is not filed within 15 days after the accused "has been held to answer for a public offense," or if a defendant charged with a felony "is not brought to trial within 60 days of the defendant's arraignment on an indictment or information ...." No affirmative showing of prejudice is necessary to obtain a dismissal for violation of the state constitutional speedy trial right *as construed and implemented by statute. (Sykes v. Superior Court* (1973) 9 Cal.3d 83, 89 [106 Cal.Rptr. 786, 507 P.2d 90].) Instead, "an unexcused delay beyond the time fixed in section 1382 of the Penal Code without defendant's

consent entitles the defendant to a dismissal." (*People v. Godlewski, supra,* at p. 682.)

Because the state constitutional speedy trial right is self-executing and broader than its statutory implementation, a defendant may claim a violation of the state Constitution's speedy trial right based on delay not covered by any statutory speedy trial provision. (*Barker v. Municipal Court, supra,* 64 Cal.2d 806, 812.) Thus, a defendant charged with a felony may predicate a claimed speedy trial violation on delay occurring after the filing of the complaint and before the defendant was held to answer the charge in superior court. In this situation, when the claimed speedy trial violation is not also a violation of any statutory speedy trial provision, this court has generally required the defendant to affirmatively demonstrate that the delay has prejudiced the ability to defend against the charge. (See, e.g., *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 438-440 [121 Cal.Rptr. 457, 535 P.2d 321].) In particular, we have held that when a defendant seeks dismissal based on delay after the filing of the complaint and before indictment or holding to answer on felony charges, a court must weigh "the prejudicial

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effect of the delay on defendant against any justification for the delay." (*Hannon, supra,* 19 Cal.3d 588, 608; accord, *People v. Hill, supra,* 37 Cal.3d 491, 496.) No presumption of prejudice arises from delay after the filing of the complaint and before arrest or formal accusation by indictment or information (*Scherling v. Superior Court, supra,* 22 Cal.3d 493, 504, fn. 8); rather, the defendant seeking dismissal must affirmatively demonstrate prejudice (*Serna v. Superior Court, supra,* 40 Cal.3d 239, 249).

Defendant asks that we overrule the decisions declining to recognize a presumption of prejudice arising from postcomplaint delay, and that we instead adopt a rule that prejudice is presumed from any

unreasonable delay after the state Constitution's speedy trial right has attached.

In support of her position, defendant argues that without a presumption of prejudice, the test for determining a violation of the state Constitution's speedy trial provision will be identical to the test for determining a violation of the state Constitution's due process provision (Cal. Const., art. I, § 15, cl. 7). Defendant maintains that use of the same test for these different constitutional rights is improper because it blurs the distinction between separate rights that protect separate interests. According to defendant, the due process guarantee protects the defendant against impairment of the ability to defend resulting from failing memories, loss or destruction of physical evidence, and the like, whereas the speedy trial guarantee protects the defendant against delay as such.

We find defendant's argument unpersuasive. (5) Defendant is correct about the convergence of the tests for determining due process and speedy trial violations under the state Constitution. As this court has said, "regardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (*Scherling v. Superior Court, supra*, 22 Cal.3d 493, 505, fn. omitted.) But we find nothing improper in this convergence when, as here, the two separate constitutional rights are protecting the same interest.

Defendant is correct that the right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence. (See *United States v. Lovasco* (1977) 431 U.S. 783, 790 [97 S.Ct. 2044, 2048-2049, 52 L.Ed.2d 752].) But this very same

interest is one of three that this court has identified as protected by the speedy trial right. The

[22 Cal.4th 768]

state Constitution's speedy trial guarantee " 'protects the accused ... against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and ... it prevents him from being "exposed to the hazard of a trial, after so great a lapse of time" that "the means of proving his innocence may not be within his reach"—as, for instance, by the loss of witnesses or the dulling of memory.' [Citations.]" (*Barker v. Municipal Court, supra,* 64 Cal.2d 806, 813; see also *Marion, supra,* 404 U.S. 307, 320 [92 S.Ct. 455, 463] [identifying same three purposes for federal speedy trial right].)

When the defendant has been arrested, detained, and publicly accused, all three of these interests are implicated. To effectively protect these interests, the defendant may invoke either the federal Constitution's speedy trial guarantee or the state statutory speedy trial provisions without being required to affirmatively demonstrate prejudice. When, on the other hand, the defendant is not subject to restraints following arrest and has not been held to answer or formally charged in the court having jurisdiction to try the offense or offenses alleged, the first two concerns are implicated little or not at all,[1] and the state Constitution's speedy

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[1] If a felony complaint has been filed but an arrest warrant has not issued, the statute of limitations protects the defendant against excessive delay, without the need to demonstrate prejudice. If a felony complaint has been filed and an arrest warrant has issued, and the defendant is aware of the complaint and therefore anxious about the pending charges, the defendant may surrender on the warrant, thereby triggering statutory requirements for a speedy arraignment on the complaint (Pen. Code, § 859) and a speedy preliminary hearing (*id.*, § 859b), after which the defendant, if held to answer, will be protected against unreasonable delay by the statutory speedy trial provisions (*id.*, § 1382), all without any need to affirmatively demonstrate prejudice. Thus, as a practical matter,

trial guarantee serves primarily the interest in fair adjudication, the very same interest that the due process guarantee serves. Because in this situation the state Constitution's due process and speedy trial guarantees converge in protecting the same interest of the accused, we consider it entirely appropriate, and not a proper ground of objection, that courts use the same test to determine whether these constitutional rights have been violated. Accordingly, we decline to overrule our prior decisions requiring a defendant to affirmatively demonstrate prejudice to establish a speedy trial claim under the state Constitution for delay occurring after the filing of a felony complaint but before attachment of the defendant's statutory speedy trial rights.

V

Finally, defendant contends that the trial court erred in not ruling before trial on defendant's motion to dismiss on speedy trial grounds.

[22 Cal.4th 769]

Defendant points out that because the trial court declined to rule on her speedy trial claim before the jury determined her guilt of the charge, she was denied an opportunity for pretrial appellate review of the trial court's ruling. This is significant because, she claims, the standard of review that appellate courts use in pretrial writ proceedings is more favorable to defendants than the standard they use in appeals from judgments after conviction.

In support of this argument, defendant relies on *People v. Wilson, supra*, 60 Cal.2d 139, and *People v. Johnson* (1980) 26 Cal.3d 557 [162 Cal.Rptr. 431, 606

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a defendant is required to affirmatively demonstrate prejudice in support of a state speedy trial claim only if the delay occurred during a time when the defendant was either unaware of a pending felony complaint and arrest warrant or chose not to take any action that would trigger the statutory speedy trial provisions.

P.2d 738, 16 A.L.R.4th 1255]. But both of those decisions concerned a claimed denial of a *statutory speedy trial right. For statutory speedy trial claims,* defendant is correct that the standard of review that appellate courts use in pretrial writ proceedings is more favorable than the standard they use in appeals from judgments after conviction. As we have explained, no affirmative showing of prejudice is necessary to obtain a dismissal for violation of the state constitutional speedy trial right as construed and implemented by statute. (*Sykes v. Superior Court, supra*, 9 Cal.3d 83, 89.) Because prejudice is not an issue, a trial court ordinarily should rule on a statutory speedy trial claim, and the defendant should seek appellate review of denial of such a claim, before the trial is held. Prejudice becomes an issue for a statutory speedy trial claim only when the defendant waits until after the judgment to obtain appellate review. "[O]nce a defendant has been tried and convicted, the state Constitution in article VI, section 13, forbids reversal for nonprejudicial error," and so on appeal from a judgment of conviction a defendant asserting a statutory speedy trial claim must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review. (*People v. Johnson, supra*, at p. 575.)

For speedy trial claims under the state Constitution not based on statute, like defendant's claim here, a demonstration of prejudice is required whether the trial court determines the issue before or after trial or verdict, and the standard of review for a ruling on such a claim is the same whether appellate review occurs before or after judgment.

When a speedy trial claim requires a demonstration of prejudice, the trial court has discretion to defer hearing the motion until after the trial: "It is proper for the trial court to wait to appraise the reasonableness of the delay in light of what would be disclosed at and after the trial, which places [the

court] in an excellent position to rule on a renewed motion." (*People v. Archerd* (1970) 3 Cal.3d 615, 641 [91 Cal.Rptr. 397, 477 P.2d 421].) As the Court of Appeal here observed: "A trial court may conclude that the motion to dismiss is best considered after trial, at which time it has the opportunity

[22 Cal.4th 770]

to determine whether material witnesses were missing or had poor memories or there was other prejudice caused by postcomplaint delay in the context of the case as a whole."

Defendant argues that because she was relying on a presumption of prejudice, it was irrelevant whether the evidence at trial revealed actual prejudice. As we have determined, however, defendant was not entitled to a presumption of prejudice because the delay at issue occurred after the filing of the felony complaint but before defendant's preliminary hearing. Because an affirmative demonstration of prejudice was essential to defendant's speedy trial claim under the state Constitution, the trial court acted within its discretion in ruling on the motion only after the completion of the trial. Defendant does not here challenge the conclusion of the trial court and the Court of Appeal that she failed to demonstrate actual prejudice.

The Court of Appeal's judgment is affirmed.

KENNARD, J.

WE CONCUR:

George, C. J.,
Mosk, J.,
Baxter, J.,
Werdegar, J.,
Chin, J.,
Brown, J.

COUNSEL

Steven J. Carroll, Public Defender, Dawnella Gilzean, Cassandra Kinchen and Gary R. Nichols, Deputy Public Defenders, for Defendant and Appellant.

Michael P. Judge, Public Defender (Los Angeles) and John Hamilton Scott, Deputy Public Defender, as Amici Curiae on behalf of Defendant and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Keith I. Motley, Pamela A. Ratner and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Filed May 17, 2000

S064558
Fourth Appellate District, Division One No. D025750

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

v.

DENISE M. MARTINEZ, Appellant

Petition for rehearing DENIED.

/s/ KENNARD
Acting Chief Justice

[Because this Decision Was "Depublished" by the Grant of Review by the California Supreme Court, No Internal Pagination Is Provided.]

In The
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

No. D025750.

[Filed Aug 12, 1997; as modified Aug. 29, 1997.]

THE PEOPLE, Plaintiff and Respondent,

v.

DENISE M. MARTINEZ, Defendant and Appellant.

(Superior Court of San Diego County, No. SCD108866, Wesley R. Mason III, Judge.)

(Opinion by McDonald, J., with Kremer, P. J., and Huffman, J., concurring.)

OPINION

McDONALD, J.- Denise M. Martinez (Martinez) appeals the judgment following her jury conviction of driving under the influence (DUI) of alcohol (Veh. Code,[1] § 23152, subd. (a)). On appeal Martinez contends the court erred by denying her motion to dismiss based on a claimed violation of her constitutional right to a speedy trial. We affirm the judgment.

Factual and Procedural Background

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[1] All statutory references are to the Vehicle Code unless otherwise specified.

On September 6, 1991, Martinez was driving her truck in an erratic manner. George Flaim (Flaim), a security officer stationed at the main gate of Naval Air Station (NAS) Miramar, observed the truck approaching the gate: It crossed over double yellow lines, swerved back and then weaved within its lane of traffic for about a block and a half. When the truck stopped, Flaim saw Martinez was the truck's driver. NAS security officers Viallega and Hawk detained Martinez, who resisted and screamed. Flaim observed Martinez closely and detected a strong odor of alcohol on her breath. He also saw a clear bottle in Martinez's truck. Flaim was certain Martinez was under the influence of alcohol. Flaim had not previously detained a DUI suspect.

San Diego Police Officer Gerald Waclawek (Waclawek) responded to the call that NAS security officers were detaining a suspected DUI driver. Waclawek approached Martinez and detected a strong odor of alcohol on Martinez's breath. He also observed that her eyes were bloodshot, her speech was slurred, her gait was unsteady, her clothing was disheveled and she was verbally abusive to him. Martinez failed the gaze nystagmus test Waclawek administered. She performed poorly on other field sobriety tests and refused to perform other tests. Waclawek took her to the police station to perform a breath test on her. She did not follow his directions and did not provide a sufficient breath sample for analysis. He formed the opinion that she was under the influence of alcohol.

On September 16, 1991, a felony complaint was filed against Martinez. A letter notifying her of the charges and of a September 30, 1991, arraignment date was mailed to the same Imperial Beach address used for a misdemeanor arrest warrant issued for Martinez on October 25, 1990.

Martinez failed to appear at the scheduled arraignment, and a warrant for her arrest was issued on January 16, 1992. The warrant showed that Martinez

lived at 7349 Eckstrom Avenue, San Diego. Apparently a check of additional computer data bases disclosed that Martinez was receiving welfare payments at 2602 Cowley Way, San Diego.

On February 19, 1992, the San Diego County Marshal's office received information that Martinez was residing in West Palm Beach, Florida. It sent an abstract of the warrant to the West Palm Beach Police Department and stated it believed she resided at 20071 Congress, Suite K-308, West Palm Beach. On April 23, 1992, the warrant was placed in the due diligence file of the San Diego County District Attorney's office.

On November 28, 1995, Martinez was arrested and arraigned the following day on the 1991 complaint.

On December 21, 1995, an information was filed against Martinez charging her with one count of DUI (§ 23152, subd. (a)) for the September 6, 1991, incident and alleging that she had four prior DUI convictions within seven years prior to the instant offense (§ 23175), thereby elevating the instant offense from a misdemeanor to a felony.

On January 26, 1996, Martinez filed a motion to dismiss the charges against her on the basis that her state and federal constitutional rights to a speedy trial were violated. The motion was scheduled to be heard on February 16, 1996. The prosecutor opposed the motion, contending that the motion should be heard after trial and, in any event, Martinez could not show she suffered any actual prejudice as a result of the delay. At the scheduled February 16, 1996, hearing, the court denied the motion to dismiss without prejudice to renewal of the motion at trial.

On February 27, 1996, the trial began; on February 29, 1996, the jury found Martinez guilty on the DUI charge (§ 23152, subd. (a)).

On March 4, 1996, the court heard and denied Martinez's motion to dismiss and found true the allegation that Martinez had four prior DUI convictions within seven years before the instant offense (§ 23175). On March 28, 1996, the court suspended imposition of sentence and granted Martinez five years of formal probation on condition she serve one hundred eighty days in local custody and meet other conditions.

Martinez filed a notice of appeal of the judgment.

Discussion

I.
Federal and State Constitutional Rights to a Speedy Trial

Both the United States Constitution and California Constitution guarantee a speedy trial to an accused or criminal defendant.[2] Although the purposes of the federal and California constitutional speedy trial guarantees are similar, the two guarantees have developed along somewhat different lines. (See, e.g., 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2565, pp. 3075-3076.) For example, although both guarantees attach on arrest of an accused, the federal guarantee attaches prior to arrest on the filing of a formal accusation of an indictment or information in felony cases (*United States v. Marion* (1971) 404 U.S. 307, 320 [92 S.Ct. 455, 463, 30 L.Ed.2d 468]) or on the filing of a complaint in misdemeanor cases *(Serna v. Superior Court* (1985) 40 Cal.3d 239, 262 [219 Cal.Rptr. 420, 707 P.2d 793]); the California guarantee attaches prior to arrest on the filing of a complaint in both felony and misdemeanor cases (*People v. Hannon* (1977) 19

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[2] The Sixth Amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial."

Cal.3d 588, 608 [138 Cal.Rptr. 885, 564 P.2d 1203]; *Serna v. Superior Court, supra*, at p. 248; *People v. Hill* (1984) 37 Cal.3d 491, 497, fn. 3 [209 Cal.Rptr. 323, 691 P.2d 989]).

Under the United States Constitution's speedy trial guarantee, a four-issue balancing test is used to determine whether that guarantee is violated. (*Barker v. Wingo* (1972) 407 U.S. 514, 530-533 [92 S.Ct. 2182, 2192-2194, 33 L.Ed.2d 101]; *Doggett v. United States* (1992) 505 U.S. 647, 651 [112 S.Ct. 2686, 2690, 120 L.Ed.2d 520].) Under the California Constitution's speedy trial guarantee, a defendant must first sustain the burden of showing prejudice was caused by the delay and, if actual prejudice is shown, the burden shifts to the prosecution to establish a permissible justification for the delay. (*Serna v. Superior Court, supra*, at pp. 249, 252.) If justification is shown, the court weighs the justification against the actual prejudice suffered by the defendant. (*Ibid.*) In contrast to California law which requires a showing of actual prejudice caused by the delay, federal law under the *Wingo* balancing test permits a presumption of prejudice in certain situations depending on the length of the delay. (*Serna v. Superior Court, supra*, at p. 252; *Doggett v. United States, supra*, at pp. 657-658 [112 S.Ct. at p. 2694].)

Martinez relies on this court's decision in *Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488 [26 Cal.Rptr.2d 615] to argue that a presumption of prejudice is possible under the California Constitution's speedy trial provision and that in this case she need not establish actual prejudice as a result of the delay. The *Stabio* court used the federal *Wingo* analysis to examine the California right to a speedy trial rather than the state analysis mandated by decisions of the California Supreme Court. (See, e.g., *Serna v. Superior Court, supra*, at pp. 249-250; *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 442 [121 Cal.Rptr. 457, 535 P.2d 321].)

The *Stabio* opinion has been criticized for applying the *Wingo* test to the California speedy trial guarantee analysis. (See *People v. Martinez* (1995) 37 Cal.App.4th 1589, 1594, fn. 5 [44 Cal.Rptr.2d 673]; *People v. Butler* (1995) 36 Cal.App.4th 455, 467 [42 Cal.Rptr.2d 279].) The validity of the criticism may be questioned because the results under the two tests may not vary. As stated in *Sykes v. Superior Court* (1973) 9 Cal.3d 83 [106 Cal.Rptr. 786, 507 P.2d 90] at page 93:

> "We hasten to note that ... we may give and in fact have previously given meaning to our constitutional provision which derives from an ad hoc balancing test similar although not identical to that now employed in [*Wingo*] ....
>
> "... In determining that the right to a speedy trial had been denied ... we weighed the prejudicial effect of the delay on the defendant against the justification for the delay .... [Citation.] It appears that the [*Wingo*] balancing test would have compelled the same result we reached [in using the California balancing test]."

However, it is inappropriate for this court to disregard our Supreme Court's direct holdings that prejudice is not presumed in a California Constitution speedy trial analysis and that the *Wingo* analysis is limited to claims under the United States Constitution. To the extent this court's opinion in *Stabio* holds that a presumption of prejudice may exist in an analysis of the California right to a speedy trial we decline to follow it.

Martinez apparently does not contend in her appellate briefs that her United States constitutional right to a speedy trial was violated or that the delay in filing this information resulted in a denial of her due process rights. (See *People v. Belton, supra*, 6

Cal.App.4th at pp. 1433-1435.) She apparently contends only that her California constitutional right to a speedy trial was violated. Because she focuses on the four-year delay before an information was filed against her, Martinez's right to a speedy trial under the United States Constitution is not involved here.[3] (*United States v. Marion, supra*, 404 U.S. at p. 320 [92 S.Ct. at p. 463].)

II.

The Court Was Not Required to Hear the Motion to Dismiss Prior to Trial

Martinez first contends the trial court erred by not hearing her motion to dismiss prior to trial rather than after trial. We disagree.

Martinez notes that unless a defendant asserts a claim of denial of a speedy trial before trial that claim is waived. (*In re Yurko* (1974) 10 Cal.3d 857, 866-867 [112 Cal.Rptr. 513, 519 P.2d 561].) In *Morse v. Municipal Court* (1974) 13 Cal.3d 149, 156 [118 Cal.Rptr. 14, 529 P.2d 46], the California Supreme Court stated: "[T]he right to speedy trial is one which must be asserted prior

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[3] At oral argument Martinez pointed out that under the Sixth Amendment of the United States Constitution the right to a speedy trial is afforded an "accused." She then argued that the California Supreme Court in *People v. Hannon, supra*, 19 Cal.3d at pages 605-608 misinterpreted the United States Supreme Court's decision in *United States v. Marion, supra*, 404 U.S. 307 by stating that *Marion* held a person is not an accused under the Sixth Amendment until a formal indictment or information is filed and that a person is not an accused on the filing of a complaint, at least in felony cases. Martinez contends that, properly analyzed, the filing of a complaint in a felony case makes the defendant an accused and invokes the federal speedy trial protections under the Sixth Amendment. She argues that *Marion* does not hold to the contrary. Martinez concludes that she is therefore entitled in this case to a speedy trial review under the Sixth Amendment *Wingo* test and need not show actual prejudice by the delay. However, she does not cite applicable authority to support her conclusion and it is not within our prerogative to hold contrary to our Supreme Court.

to the actual commencement of trial, usually by means of a motion to dismiss made at the time the trial date is set or at the time the case is called for trial." Although a defendant must assert a claim before trial to avoid waiver of that claim, a trial court is not required to hear and decide that claim before trial. In *People v. Archerd* (1970) 3 Cal.3d 615, 641 [91 Cal.Rptr. 397, 477 P.2d 421], the California Supreme Court stated: "It is proper for the trial court to wait to appraise the reasonableness of the delay in light of what would be disclosed at and after the trial, which places him in an excellent position to rule on a renewed motion. [Citation.] That is what the court did here. Although it did make a comment that there must have been some prejudice to defendant because of the delay, it reserved its ruling until the end of the trial." A trial court has discretion to hear a pretrial speedy trial motion to dismiss either before or after trial. (*People v. Abraham* (1986) 185 Cal.App.3d 1221, 1225-1226 [230 Cal.Rptr. 325].) A trial court may conclude that the motion to dismiss is best considered after trial, at which time it has the opportunity to determine whether material witnesses were missing or had poor memories or there was other prejudice caused by postcomplaint delay in the context of the case as a whole.

We conclude the trial court here properly exercised its discretion to hear and decide after trial Martinez's motion to dismiss. The short delay from the initial scheduled hearing date of February 16, 1996, to the posttrial hearing date of March 4, 1996, was not unduly long and afforded the trial court the opportunity to weigh the credibility and memories of witnesses both at trial and at the hearing in the context of the evidence showing Martinez's guilt of the instant offense. The court did not abuse its discretion by hearing and deciding after trial the motion to dismiss.

III.

Substantial Evidence Supports the Court's Finding That Martinez Did Not Show She Suffered

Actual Prejudice From the Delay

A

A three-step analysis is used to decide whether a defendant's speedy trial right under the California Constitution was denied. First, the defendant bears the burden of showing that actual prejudice to the defense case was caused by the delay. Second, if the defendant meets that burden, then the burden shifts to the prosecution to show justification for the delay. Third, the court balances the actual prejudice shown by the defendant against the prosecution's justification for the delay. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911 [55 Cal.Rptr.2d 404]; *People v. Lawson* (1979) 94 Cal.App.3d 194, 198 [156 Cal.Rptr. 226].)

Actual prejudice to the defense may be, but is not necessarily, shown by the loss of material witnesses or the loss of evidence because of fading memories of witnesses attributable to the delay. (*People v. Butler, supra*, 36 Cal.App.4th at pp. 464-466.) "If defendant fails to show prejudice, the court need not inquire into the justification for the delay since there is nothing to 'weigh' such justification against." (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 911; see also *Serna v. Superior Court, supra*, 40 Cal.3d at p. 249.) "Prejudice is a factual question to be determined by the trial court. [Citation.]" (*People v. Hill, supra*, 37 Cal.3d at p. 499.) "The trial court's ruling must be upheld on appeal if it is supported by substantial evidence. [Citation.]" (*People v. Dunn-Gonzalez, supra*, at p. 912, citing *People v. Mitchell* (1972) 8 Cal.3d 164, 167 [104 Cal.Rptr. 348, 501 P.2d 916]; see also *People v. Hill, supra*, at p. 499; *People v. Martinez, supra*, 37 Cal.App.4th at p. 1593.)

B

During the two-day trial, Flaim and Waclawek

testified on behalf of the prosecution. The defense presented no evidence at trial.

After the jury returned its guilty verdict, the trial court heard Martinez's renewed motion to dismiss based on a purported denial of her speedy trial rights. Martinez testified at the hearing that she had no recollection of the events of September 6, 1991; she did not remember being arrested or being released from custody. She attempted to refresh her memory by reading the police report but still had no recollection of those events. She admitted her difficulty in recollecting events that happen while she is under the influence of alcohol. She also testified she lived at six different addresses from September 1991 through November 1995. She never left forwarding addresses when she moved. She denied having lived at the Imperial Beach address to which the original notification letter was sent.

Michael Booth (Booth), a defense investigator, testified he first attempted to locate Flaim, Hawk and Viallega on February 7, 1996. On February 22, 1996, Booth received a report from a district attorney's office investigator which disclosed the addresses of Flaim and Viallega. Booth did not attempt to contact Viallega. Booth independently determined that Hawk was deployed on a Navy ship at sea at the time of trial. Martinez made no offer of proof showing how the testimony of Viallega or Hawk would have assisted her defense.

The trial court denied Martinez's motion to dismiss. It found that Martinez's inability to recollect events was the result not of prosecutorial delay but of her ingestion of alcohol prior to the incident. Further, the court doubted Martinez's inability to recall the incident, particularly her release from jail after becoming sober. The court questioned her credibility in claiming an inability to recall anything. In contrast, the court believed that Flaim's memory of the incident was

clear because it was his first DUI incident and the delay had not impaired his memory.

The court then addressed the ultimate issue:

> "The real question boils down to: What actual prejudice has she incurred? I'm looking at the actual evidence of her guilt. I'm looking at the-what I found to be not credible testimony as to her total absence of memory she was ever in jail or any evidence of the-in her mind of the underlying incident.
>
> "The witnesses, that one was unavailable being at sea, the other in Texas, those were basically going to be prosecution witnesses. Certainly, there may have been something on cross-examination that might have assisted her if they had been produced, but basically, they were not there to assist or would not have been called to assist her as defense witnesses.
> * * *
>
> "The actual prejudice is basically, at this point, I think, still speculative. I can't find actual prejudice to her, certainly not because of her claimed lack of memory. I find that to be somewhat disingenuous on her part."

Accordingly, the court denied Martinez's motion to dismiss.

C

Martinez contends she suffered actual prejudice because of her inability to recall the incident and the unavailability of two witnesses, Viallega and Hawk. She argues the "passage of time alone gives rise to

prejudice." However, the passage of time alone is insufficient to establish prejudice under California law. (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 914.) Further, it was Martinez's burden to show that she suffered actual prejudice from the delay, and the trial court's finding of no actual prejudice will be upheld if supported by substantial evidence. (*Id.* at pp. 911-912.) Martinez's purported memory loss attributed to the delay was rejected by the trial court. It found that her purported memory loss was probably the result of alcohol consumption. As in *People v. Butler, supra*, 36 Cal.App.4th at page 464: "Appellant's memory was impaired, but the impairment appears to have had nothing to do with the passage of time, but was the result of extended ingestion of alcohol. Moreover, it appears that [she] had no better recall of the relevant events shortly after they occurred than [she] had at trial." In any event, the trial court here did not find Martinez's claim of nonrecollection credible but instead found a "selective" inability to remember.

Further, Martinez made no offer of proof showing that either Viallega or Hawk could provide exculpatory evidence for her defense. The trial court found that these two NAS security officers were prosecution witnesses and it was speculative whether they could provide testimony on cross-examination favorable to Martinez's defense. Martinez did not show that the presence of Viallega or Hawk would have aided her defense, and the record here shows "there was no likelihood that the presence of [these witnesses] would have affected the outcome of the trial." (*People v. Butler, supra*, 36 Cal.App.4th at p. 464.) As the California Supreme Court noted: " 'The showing of actual prejudice which the law requires must be supported by particular facts and not ... by bare conclusionary statements. [Citation.]' (*Serna v. Superior Court, supra*, 40 Cal.3d at p. 250, quoting *Crockett v. Superior Court, supra*, 14 Cal.3d at p. 442.)

Martinez did not meet her burden of showing that she suffered actual prejudice from the prosecutorial delay. She merely speculates that the testimony of the two unavailable prosecution witnesses would have aided her defense. Accordingly, substantial evidence supports the trial court's finding that Martinez suffered no actual prejudice from the delay, and the court did not err by denying her motion to dismiss.[4]

Disposition

The judgment is affirmed.

Kremer, P. J., and Huffman, J., concurred.

COUNSEL

Steven J. Carroll, Public Defender, Dawnella Gilzean, Cassandra Kinchen and Gary Nichols, Deputy Public Defenders, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Keith I. Motley and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

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[4] Martinez also contends the trial court violated the doctrine of stare decisis by rejecting this court's holding in *Stabio v. Superior Court, supra*, 21 Cal.App.4th 1488. However, as we noted above, we decline to apply *Stabio*'s presumption of prejudice because California Supreme Court case law precedent requires a showing of actual prejudice to establish a violation of the right to a speedy trial under the California Constitution. (See, e.g., *Serna v. Superior Court, supra*, 40 Cal.3d at pp. 249-250.) Thus, the trial court here properly applied precedential case law.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

San Diego Judicial District

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. DENISE MARTINEZ, aka DENISE MARGARET MARTINEZ aka DENISE MARGARET SCHERTZ Defendant(s)	MC No. F142624 DA No. B095460

COMPLAINT
SUMMARY

Ct. No.	Charge	Sentence Range	Defendant	Special Allegation	Alleg. Effect
1	VC23152(a)	Check	MARTINEZ,	VC23175	16-2-3
	PC1054.3	REQUEST FOR INFORMAL DISCOVERY			

The undersigned, certifying upon information and belief, complains that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

COUNT - 1 DRIVING UNDER THE INFLUENCE AND REFUSED CHEMICAL TEST

On or about September 6, 1991 DENISE MARTINEZ did willfully and unlawfully, while under the influence of an alcoholic beverage and a drug and under their combined influence, drive a vehicle and, further, in violation of Vehicle Code Section 23159, did willfully refuse a peace officer's request to submit to, and willfully failed to complete, the chemical tests pursuant to Vehicle Code Section 23157, in violation of VEHICLE CODE SECTION 23152(a).

And it is further alleged that within seven years of the commission of the above offense, said defendant was in the Municipal Court of the South Bay Judicial District, County of San Diego, State of California, previously convicted of the offense of violation of Vehicle Code section 23152, to wit: (Date of Offense) April 03, 1988, (Date of Conviction) October 10, 1989, (Docket #) S29772, (Court Code #) 37485 ; and, was in the Municipal Court of the El Cajon Judicial District, County of San Diego, State of California, previously convicted of the offense of violation of Vehicle Code section 23152, to wit: (Date of Offense) June 02, 1989, (Date of Conviction) November 09, 1989, (Docket #) C97124, (Court Code #) 37440 ; and was in the Municipal Court of the El Cajon Judicial District, County of San Diego, State of California, previously convicted of the offense of violation of Vehicle Code section 23152, to wit: (Date of Offense) June 13, 1989, (Date of Conviction) November 09, 1989, (Docket #) C97176, (Court Code #) 37440, and, was in the Superior Court of the San Diego Judicial District, County of San Diego, State of California, previously convicted of the offense of violation of Vehicle Code section 23152, to with: (Date of Offense) September 27, 1989, (Date of Conviction) January 05, 1990, (Docket #) CR110085, (Court Code #) 37100, thus raising the present offense to the status of a felony, within the meaning of Vehicle code section 23175.

Pursuant to Penal Code section 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by Penal Code section 1054.3.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER FF 142624, CONSISTS OF 1 COUNT(S).

Executed at San Diego, County of San Diego, on September 16, 1991.

/s/ [Indecipherable]
COMPLAINANT

. . . . . .

AGENCY: SDPD TIU AGENCY CASE: 1-168166

PRELIM.TIME EST.:2 Hrs.

DEFENDANT	STATUS	DOB	BOOKING NUMBER	BAIL RECOM'D	APP'NCE DATE
MARTINEZ, DENISE	LETTER	1/07/47	91168166A		9/30/91

Social Security number: 098365646

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO
EDWIN L. MILLER, JR., District Attorney
220 West Broadway, San Diego, CA 92101

September 16, 1991

DENISE MARTINEZ
1435 Elder Avenue
Imperial Beach CA 92032

Re: People v. DENISE MARTINEZ
FF 142624
B 095460

Dear DENISE MARTINEZ:

A complaint has been issued by this office and filed in the San Diego Judicial District charging you with violation(s) of:

VC 23152(a) DRIVING UNDER THE INFLUENCE AND REFUSED CHEMICAL TEST

A date for your arraignment has been set for September 30, 1991 at 09:30 a.m. in the Municipal Court of California, San Diego Judicial District, Felony Arraignment, Room 2016 , 220 West Broadway, San Diego, California. It will be necessary for you to submit to the booking process at that time unless it has already been accomplished.

Failure to make this appearance will result lin the issuance of a warrant for your arrest.

Very truly yours,
[No Signature on Court Copy]
Deputy District Attorney
San Diego Office

cc: Municipal Court of the State of CaliforniaSan Diego Judicial District

RELEVANT CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS

California Constitution, Art. 6, §1.

The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, and municipal courts. All courts are courts of record.

California Constitution, Art. 6 § 23.

(a) The purpose of the amendments to Sections 1, 4, 5, 6, 8, 10, 11, and 16, of this article, and the amendments to Section 16 of Article I, approved at the June 2, 1998, primary election is to permit the Legislature to provide for the abolition of the municipal courts and unify their operations within the superior courts. Notwithstanding Section 8 of Article IV, the implementation of, and orderly transition under, the provisions of the measure adding this section may include urgency statutes that create or abolish offices or change the salaries, terms, or duties of offices, or grant franchises or special privileges, or create vested rights or interests, where otherwise permitted under this Constitution.

(b) When the superior and municipal courts within a county are unified, the judgeships in each municipal court in that county are abolished and the previously selected municipal court judges shall become judges of the superior court in that county. The term of office of a previously selected municipal court judge is not affected by taking office as a judge of the superior court. The 10-year membership or service requirement of Section 15 does not apply to a previously selected municipal court judge. Pursuant to Section 6, the Judicial Council may prescribe appropriate education and training for judges with regard to trial court unification.

(c) Except as provided by statute to the contrary, in any county in which the superior and municipal courts become unified, the following shall occur automatically in each preexisting superior and municipal court:

(1) Previously selected officers, employees, and other personnel who serve the court become the officers and employees of the superior court.

(2) Preexisting court locations are retained as superior court locations.

(3) Preexisting court records become records of the superior court.

(4) Pending actions, trials, proceedings, and other business of the court become pending in the superior court under the procedures previously applicable to the matters in the court in which the matters were pending.

(5) Matters of a type previously within the appellate jurisdiction of the superior court remain within the jurisdiction of the appellate division of the superior court.

(6) Matters of a type previously subject to rehearing by a superior court judge remain subject to rehearing by a superior court judge, other than the judge who originally heard the matter.

(7) Penal Code procedures that necessitate superior court review of, or action based on, a ruling or order by a municipal court judge shall be performed by a superior court judge other than the judge who originally made the ruling or order.

California Penal Code, § 806.

A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate. Such complaint may be verified on information and belief. When the complaint is used as a pleading to which the defendant pleads guilty under Section 859a of this code, the complaint shall contain the same allegations, including the charge of prior conviction or convictions of crime, as are required for indictments and informations and, wherever applicable, shall be construed and shall have substantially the same effect as provided in this code for indictments and informations.

California Penal Code, § 813.

(a) When a complaint is filed with a magistrate charging a public offense originally triable in the superior court of the county in which he or she sits, if, and only if, the magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, the magistrate shall issue a warrant for the arrest of the defendant, except that, upon the request of the prosecutor, a summons instead of an arrest warrant shall be issued.

(b) A summons issued pursuant to this section shall be in substantially the same form as an arrest warrant and shall contain all of the following:

(1) The name of the defendant.
(2) The date and time the summons was issued.
(3) The city or county where the summons was issued.

(4) The signature of the magistrate, judge, justice, or other issuing authority who is issuing the summons with the title of his or her office and the name of the court or other issuing agency.

(5) The offense or offenses with which the defendant is charged.

(6) The time and place at which the defendant is to appear.

(7) Notification that the defendant is to complete the booking process on or before his or her first court appearance, as well as instructions for the defendant on completing the booking process.

(8) A provision for certification by the booking agency that the defendant has completed the booking process which shall be presented to the court by the defendant as proof of booking.

(c) If a defendant has been properly served with a summons and thereafter fails to appear at the designated time and place, a bench warrant for arrest shall issue. In the absence of proof of actual receipt of the summons by the defendant, a failure to appear shall not be used in any future proceeding.

(d) A defendant who responds to a summons issued pursuant to this section and who has not been booked as provided in subdivision (b) shall be ordered by the court to complete the booking process.

(e) The prosecutor shall not request the issuance of a summons in lieu of an arrest warrant as provided in this section under any of the following circumstances:

(1) The offense charged involves violence.

(2) The offense charged involves a firearm.

(3) The offense charged involves resisting arrest.

(4) There are one or more outstanding arrest warrants for the person.

(5) The prosecution of the offense or offenses with which the person is charged, or the prosecution of any other offense or offenses would be jeopardized.

(6) There is a reasonable likelihood that the

offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered.

(7) There is reason to believe that the person would not appear at the time and place specified in the summons.

California Penal Code, § 814.

A warrant of arrest issued under Section 813 may be in substantially the following form:

County of _____

The people of the State of California to any peace officer of said State:

Complaint on oath having this day been laid before me that the crime of _____ (designating it generally) has been committed and accusing _____ (naming defendant) thereof, you are therefore commanded forthwith to arrest the above named defendant and bring him before me at _____ (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at _____ (place) this _____ day of _____, 19___.

_____

(Signature and full official title of magistrate.)

California Penal Code, § 815a.

At the time of issuing a warrant of arrest, the magistrate shall fix the amount of bail which in his judgment in accordance with the provisions of Section 1275 will be reasonable and sufficient for the appearance of the defendant following his arrest, if the offense is bailable, and said magistrate shall endorse upon said warrant a statement signed by him, with the name of his office, dated at the county, city or town

where it is made to the following effect "The defendant is to be admitted to bail in the sum of _____ dollars" (stating the amount).

California Penal Code, § 948.

All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

California Penal Code, § 949.

The first pleading on the part of the people in the superior court is the indictment, information, accusation, or the complaint in any case certified to the superior court under Section 859a or the complaint filed in accordance with the provisions of Section 272. The first pleading on the part of the people in all inferior courts is the complaint except as otherwise provided by law.

California Penal Code, § 950.

The accusatory pleading must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties;

2. A statement of the public offense or offenses charged therein.

California Penal Code, § 951.

An indictment or information may be in substantially the following form:

The people of the State of California against A. B. In the

superior court of the State of California, in and for the county of _____. The grand jury (or the district attorney) of the county of _____ hereby accuses A. B. of a felony (or misdemeanor), to wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the _____ day of _____, 19___, in the county of _____, State of California, he (here insert statement of act or omission, as for example, "murdered C. D.").

California Penal Code, § 952.

In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.

California Penal Code, § 959.

The accusatory pleading is sufficient if it can be understood therefrom:

1. That it is filed in a court having authority to receive it, though the name of the court be not stated.

2. If an indictment, that it was found by a grand jury of the county in which the court was held, or if an information, that it was subscribed and presented to the court by the district attorney of the county in which the court was held.

3. If a complaint, that it is made and subscribed by some natural person and sworn to before some officer entitled to administer oaths.

4. That the defendant is named, or if his name is unknown, that he is described by a fictitious name, with a statement that his true name is to the grand jury, district attorney, or complainant, as the case may be, unknown.

5. That the offense charged therein is triable in the court in which it is filed, except in case of a complaint filed with a magistrate for the purposes of a preliminary examination.

6. That the offense was committed at some time prior to the filing of the accusatory pleading.

NEWS

Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS
Public Information Office
(415) 865-7740
Lynn Holton, Public Information Officer

Release Date: June 28, 2000 Release Number: 33

Judicial Council Certifies Historic Unification Vote in Kern County

Kern Becomes 56th and Final Eligible California County To Unify Municipal and Superior Courts

San Francisco——The Judicial Council yesterday certified trial court unification in Kern County, making this Central Valley county the 56th and final eligible California county to create a single, or unified, countywide superior court.

Certification by the Judicial Council"s Executive and Planning Committee follows formal notice that a majority of Kern"s superior and municipal court judges approved unification on Monday, June 26, the final day of the prescribed 30-day voting period. Unification will take effect July 1, 2000.

""The vote in Kern County represents an important milestone in trial court unification, as the majority of trial court judges in all California"s eligible counties have voted to unify their trial court operations,"" said Chief Justice Ronald M. George. ""I congratulate the leadership of the Kern County trial courts for their vision and commitment to the continuous improvement of services for the public.""

BEST AVAILA

Benefits of Unification

Court unification is designed to increase the public"s access to justice by adding flexibility in case assignments, consolidating court resources, and saving taxpayer dollars. Proposition 220, passed by California voters in June 1998, permits each county to unify court operations if a majority of the county"s municipal and superior court judges vote to do so.

Kings and Monterey counties are the only two California counties that are currently ineligible to vote for trial court unification. Both counties are designated as preclearance jurisdictions under the federal Voting Rights Act of 1965. They have filed for preclearance authorization from the U.S. Department of Justice.

Voting Actions to Date

As specified by the California Rules of Court, county courts may vote on unification by either one of two procedures: all superior and municipal court judges in the county may approve the action by unanimous written consent, or they may vote over a 30-day period after one or more presiding judges submit an application to ""call for a vote."" Under the 30-day procedure, a majority of the judges in both the superior and municipal courts must approve unification for the vote to pass.

Of the 56 trial court unifications to date, 45 were approved by unanimous written consent, and 11 were approved by votes taken over a 30-day period.

The Judicial Council, chaired by Chief Justice George, is the state constitutional body charged with improving the administration of the California courts.

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